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June 25, 1991

RECEIVED

JUN 25 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: Channel 54, Slidell, Louisiana
File Nos. BPCT-900518KO
BPCT-900726KG

Dear Ms. Searcy:

Transmitted herewith, on behalf of Caroline K. Powley, d/b/a Unicorn Slidell, applicant in the above-captioned proceeding, is an original and three copies of a Motion to Dismiss or Deny the application of Trudy M. Mitchell.

Should any questions arise concerning this matter, kindly communicate with the undersigned.

Sincerely,



B. Jay Baraff
Counsel for
Caroline K. Powley d/b/a
Unicorn Slidell

Enclosures

RECEIVED

JUN 25 1991

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)

CAROLINE K. POWLEY)
d/b/a UNICORN SLIDELL)
Slidell, Louisiana)

File No. BPCT-900518KO

TRUDY M. MITCHELL)
Slidell, Louisiana)

File No. BPCT-900726KG

)
For a Construction Permit)
for a new UHF Commercial)
Television Station to)
Operate on Channel 54,)
Slidell, Louisiana)

To the Chief, Mass Media Bureau

MOTION TO DISMISS OR DENY

Caroline K. Powley d/b/a Unicorn Slidell ("Unicorn"),
applicant for a construction permit to build a new UHF Commercial
Television Station to operate on Channel 54, Slidell, Louisiana,
by its attorneys, hereby submits its Motion to Dismiss or Deny
the above-captioned application of Trudy M. Mitchell.¹ In
support, the following is respectfully shown.

¹ Inasmuch as this pleading raises issues of transcendent importance to the resolution of this proceeding in the public interest, to the extent that a waiver of the Commission's procedural rules might be deemed appropriate in order to consider these matters, such treatment is specifically requested. See, e.g., The Edgefield-Saluda Radio Company, 5 FCC 2d 148, 149 (Rev. Bd. 1966).

BACKGROUND

1. On April 30, 1990, Ms. Mitchell filed her first application for Channel 54, which was initially accepted for filing. However, on June 18, 1990, her application was returned as inadvertently accepted for filing because she certified that she did not have sufficient net liquid assets to build and operate the station. By staff letter of that date advising her of that action, Ms. Mitchell was given copies of the current FCC Form 301 and the Fee Filing Guide, describing the applicable filing fees and procedures in the event she wished to reapply for the channel. No reconsideration of the return of her application was sought, and the cut-off date established by her filing was deleted.

2. On May 18, 1990, Unicorn tendered its above-captioned application to operate on Channel 54 and a cut-off date of July 31, 1990 was established when that application was accepted for filing. Mitchell filed a second application for Channel 54 within that period, certifying that she was financially qualified. However, apparently believing that she was owed a refund on the return of her first application, Mitchell submitted a filing fee for the difference.²

3. By staff letter dated February 5, 1991, Mitchell was informed that because the June 18 action returning her previous

² By the time she submitted her second application, the filing fee for new television applications had increased to \$2,535.00. Mitchell's application was accompanied by a check for only \$285.00, the difference between her originally-tendered \$2,250.00 and the current filing fee of \$2,535.00.

application was a decision on the merits of her basic qualifications to be a Commission licensee, she had forfeited the filing fee submitted with that application. Nevertheless, her second application was accepted for filing on that date, and she was billed for the difference. The staff warned that the failure to pay would result in a penalty and/or dismissal of the application. Presumably, she paid the difference as her application to date has not been dismissed.

4. As to the second application itself, Mitchell states that she is in full compliance with all technical requirements, and notes no short-spacings or requests for waiver thereof. Specifically, Mitchell represents, at Section V-C, Item 13, of her application that the proposed facility satisfies the requirements of Section 73.610 of the Commission's rules with regard to the minimum distance separations required between stations.

ARGUMENT

5. As filed, Mitchell's application specifies the existing tower of WCCL(TV), Channel 49, New Orleans, Louisiana. However, Sections 73.610(d) and 73.698 of the Commission's rules effectively require a 31.4 kilometer separation between stations operating on Channels 49 and 54. As tendered, the Mitchell application proposes no separation between the proposed Channel 54 facility and the existing Channel 49 facility, resulting in 100 percent short-spacing.

6. Section 73.3566(a) of the Commission's rules states, in

pertinent part, that "applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed." As filed, Mitchell's application neither complies with the spacing requirements of Sections 73.610 and 73.698, nor includes a request for waiver of the requirements of those rules.³ Accordingly, the acceptance of Mitchell's application for filing was apparently inadvertent but nonetheless impermissible, and the application should be immediately dismissed. See, Emmy Hahn Ltd. Partnership, 67 RR2d 263, 264 (1989). See, also, Womens Media Investors of Dallas, Ltd., 49 FR 30115, 30117 (1984).⁴

³ In fact, Mitchell's application is replete with deficiencies and errors, and is internally inconsistent. For example, in Section V-C, Item 14 of the application Mitchell claims that there are no proposed or authorized FM or TV transmitters located within 60 meters of the proposed antenna, yet Section V-C, Item 3 and Exhibit E2 of the application clearly state that both an FM and TV station are on the same tower proposed by Mitchell. As another example, the contour map provided in response to Section V-C, Item 16, fails to clearly, legibly or accurately, or in any way depict the proposed transmitter location, the radials along which profile graphs have been prepared, the City Grade, Grade A and Grade B predicted contours and the legal boundaries of the principal community to be served as required by the application and Section 73.684(d) of the Commission's rules.

⁴ Womens Media, noted above, involved numerous mutually exclusive applications, three of which contained proposals for 100 percent short-spacings to other channels located at the same transmitter site along with requests for waiver of the separation requirements of Sections 73.610 and 73.698. There, the Commission declined to even designate those applications for a comparative hearing with the other mutually-exclusive applicants

7. Additionally, further grounds exist for the immediate dismissal of Mitchell's application. When Mitchell filed the subject application, it did not contain the proper filing fee. Instead, that application was filed with a fee representing the difference between the fee then due and the refund she apparently believed was due her after her first application was dismissed on the merits resulting from her lack of financial qualification. Nevertheless, Section 1.1107(b) of the Commission's rules expressly requires, in pertinent part, "filings subject to a fee ... that are submitted without a fee [or] with an insufficient fee ... shall be dismissed and the application returned to the applicant ... without processing." (Emphasis added.) Inasmuch as the fee accompanying Mitchell's application was patently defective on its face, it should have been immediately discovered upon its tender and her application dismissed. See, Sections 1.1107(b), 1.1114(a), and 73.3566(a) of the Commission's rules.

8. Section 1.1114(b) of the rules addresses those

and dismissed the short-spaced applications outright. In so doing, the Commission observed, among other things, that the existence of fully spaced proposals militated heavily against the grant of a short-spaced application, particularly as the greater the deviation from the spacing rules, the higher the burden on those seeking waiver. Moreover, the nature of the intermodulation or "receiver" interference proposed (which is the gravamen of Section 73.698) could not be overcome by equipment adjustment as might be the case with interference created by two signals causing interference to each other. Finally, noting the absence of a sufficient showing to support an unprecedented 100 percent short-spacing waiver request, the waiver requests were denied as contrary to the public interest and the applications dismissed. Similar treatment should be accorded Mitchell's present application, which did not even contain a waiver request or even recognize its extreme variance from the Commission's rules.

situations where applications accompanied by insufficient fees are inadvertently forwarded to the staff for substantive review, as is the case here. Where the fee discrepancy is not discovered within thirty days from the receipt of the application, applicants are to be billed for the amount due, with a penalty charge for 25 percent of the amount due added to the bill, pursuant to Section 1.114(b). There is no indication that such a penalty was ever paid by Mitchell.

9. Moreover, even if such a penalty was included in a subsequent fee submission, Section 73.1114(a)(2) of the rules provides that, for purposes of determining whether such a filing is timely, the date of resubmission with the correct fee will be considered the date of filing. In this case, to be timely considered mutually exclusive with Unicorn's application, Mitchell's application would have been due July 31, 1990, the cut-off date established by the acceptance for filing of the Unicorn application. Thus, and without regard to whether any penalty was properly paid, Mitchell's resubmission of the proper fee any time after July 31, 1990, would certainly not be entitled to comparative consideration. See, Section 73.3572(d) of the Commission's rules. See, also, Way of Life Television Network, Inc., 41 RR2d 1555 (1977); Carolina Broadcasting Company, 16 RR2d 801, 803 (1969).

10. It is clear that as of at least February 5, 1991, the date of the staff's second letter to Ms. Mitchell, the proper fee had not been paid. Therefore, pursuant to Section 1.1114(a)(2),

that application cannot be considered as having been timely filed by the established cut-off date. Inasmuch as the cut-off rules are designed to inject order and finality into Commission proceedings, and protect compliant applicants and the public to be served against prolonged and unnecessary delays that would result from deviation from these rules, Mitchell's application should immediately be dismissed at this stage in the proceedings to avoid further and unwarranted expense and delay to Unicorn and the public to be served by its station, as well as to protect the integrity of the Commission's administrative processes. Any other conclusion would impose paramount unfairness on those applicants complying with the Commission's rules and procedures, and would work to the ultimate benefit of those applicants indifferent to the Commission's processing rules and procedures. Any lack of understanding by Mitchell of the rules is clearly her sole responsibility as the Bureau's June 1990, letter advised her of the need to file a new and complete filing fee for any resubmitted application and specifically provided her with appropriate instructions and fee information.⁵

CONCLUSION

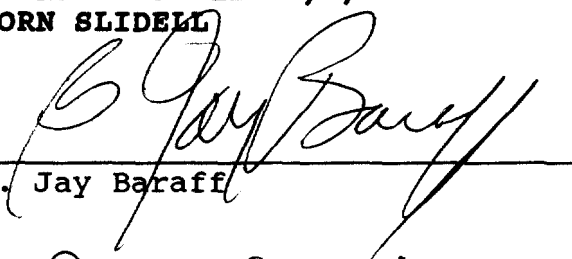
11. For the above-stated reasons, Mitchell's application as tendered is patently not in accordance with the FCC's rules, regulations or other requirements. In the absence of any

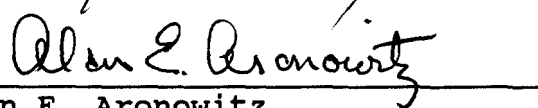
⁵ Even if Mitchell sought reconsideration of the dismissal of her initial application, the filing of a complete fee would have been required. Nevertheless, Mitchell chose not to avail herself of that option, instead tendering a wholly new application without the proper fee.

appropriate request for waiver with respect to either the Commission's spacing or fee requirements, that application should be immediately dismissed. Any contrary action would work to the benefit of those applicants indifferent to the Commission's rules and to the detriment of both compliant applicants and the public which will be unnecessarily delayed in receiving a new commercial television service.

Respectfully submitted,

CAROLINE K. POWLEY d/b/a
UNICORN SLIDELL

By: 
B. Jay Baraff

By: 
Alan E. Aronowitz
Its Attorneys

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June 25, 1991

CERTIFICATE OF SERVICE


I, Frances B. Brock, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., certify that on this 25th day of June, 1991, a copy of the foregoing "Motion to Dismiss or Deny" was mailed via first-class, United States Mail, postage prepaid, to each of the following:

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Ms. Trudy M. Mitchell
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Frances B. Brock

*Delivered by hand